

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





# TRANSCRIPT OF RECORD.

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Court of Appeals of the District of Columbia.

JANUARY TERM, 1925.

No. 4267.

190

AMERICAN RAILWAY EXPRESS COMPANY, INCORPORATED, PLAINTIFF IN ERROR,

*vs.*

THE FASHION SHOP, INCORPORATED.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF COLUMBIA.

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FILED DECEMBER 27, 1924.

PRINTED FEBRUARY 19, 1925.

Court of Appeals of the District of Columbia.

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# Court of Appeals of the District of Columbia.

No. 4267.

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AMERICAN RAILWAY EXPRESS COMPANY, INCORPORATED, Plaintiff  
in Error,

vs.

THE FASHION SHOP, INCORPORATED.

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1           Municipal Court of the District of Columbia.

No. 82454.

THE FASHION SHOP, INCORPORATED, Plaintiff,

vs.

AMERICAN RAILWAY EXPRESS COMPANY, INCORPORATED, Defendant.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered, That in the Municipal Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

2                           *Declaration.*

Filed August 18, 1922.

In the Municipal Court of the District of Columbia.

No. 82454.

THE FASHION SHOP, INCORPORATED, Plaintiff,

vs.

AMERICAN RAILWAYS EXPRESS COMPANY, INCORPORATED,  
Defendant.

*Declaration.*

*First Count.* The plaintiff, The Fashion Shop, Incorporated, a corporation, sues the defendant, American Railway Express Company, Incorporated, a corporation, for that heretofore, to-wit, Octo-

ber 20, 1920, at the City of Washington, in the District of Columbia, the plaintiff delivered to the defendant and the defendant received from the plaintiff one box containing Thirteen (13) dozen shirts, of the value of two hundred eighty-six and 00/100 dollars (\$286.00), consigned to the Prominent Shirt Company, New York City, and in consideration of the obligation thereby undertaken by the defendant the plaintiff paid to the defendant the sum of Three and 38/100 dollars (\$3.38); that said merchandise was received by the defendant from the plaintiff for the purpose aforesaid, and the plaintiff relied upon the defendant faithfully performing its said obligation to deliver to the consignee as aforesaid; that in the circumstances as aforesaid the defendant was under a further obligation, and understood, in the event of the failure or refusal of the said consignee to receive the said merchandise, to give notice of such failure or refusal to the consignor; and for that on, to-wit, May 2, 1922, plaintiff was indirectly informed for the first time that the consignee ~~had~~

3 had never received the said shipment, having failed or refused to receive same; and for that the defendant never, prior to May 2, 1922, advised the plaintiff of the non-delivery of the said shipment, or of the failure or refusal of the consignee to receive the same; and for that on May 2, 1922, plaintiff called upon the defendant to account for the said shipment, and was advised that the defendant had sold same for the sum of ninety-eight and 00/100 dollars (\$98.00); and for that by reason of the premises, the defendant, American Railway Express Company, Incorporated, undertook and promised to pay to the plaintiff the sum of \$289.38, but has hitherto failed and refused to, and still fails and refuses to pay the same; wherefore the plaintiff claims from the defendant the sum of two hundred eighty-nine and 38/100 dollars (\$289.38), with interest from October 20, 1920, until paid, according to the Bill of Particulars hereto annexed, besides costs.

*Second Count.* The plaintiff, The Fashion Shop, Incorporated, a corporation, sues the defendant, American Railway Express Company, Incorporated, a corporation, for that heretofore, to-wit, October 20, 1920, at the City of Washington, in the District of Columbia, the plaintiff was lawfully possessed as of its own property, of certain chattels, to-wit, thirteen (13) dozen shirts of the value of two hundred eighty-six and 00/100 dollars (\$286.00), and being so possessed, the plaintiff, afterwards, to-wit—the day, month, and year, first above-mentioned, at the City, and in the District aforesaid, casually lost the said chattels out of its possession, and the same afterwards, to-wit, the day, month, and year, last aforesaid, and at the City, and in the District aforesaid, came into the possession of

4 the defendant by finding; yet the defendant, well knowing the said chattels to be the property of the plaintiff, and of right to belong and appertain to plaintiff, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the plaintiff in this behalf, hath not as yet delivered the said chattels, or any of them, to the plaintiff but hath hitherto wholly failed and refused so to do, although thereto often requested by the plaintiff; and afterwards, to-wit, October 22, 1920, the defendant converted



and disposed of the said chattels to its own use, to the damage of the plaintiff in the sum of two hundred eighty-nine and 38/100 dollars (\$289.38); wherefore the plaintiff brings its suit, and claims damages from the defendant in the sum of two hundred eighty-nine and 38/100 dollars (\$289.38), and further damages by way of interest on the said last named amount from October 20, 1920, until paid, according to the Bill of Particulars, hereto annexed, besides costs.

*Third Count.* The plaintiff, The Fashion Shop, Incorporated, a corporation, sues the defendant, American Railway Express Company, Incorporated, a corporation, for money payable by the defendant for goods sold and delivered by the plaintiff to the defendant; and for goods bargained and sold by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at its request; and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at its request; and for money received by the defendant for the use of the plaintiff; and for interest on money due and owing from the defendant to the plaintiff; and for the forbearance of interest, by the plaintiff at the defendant's request, of moneys due and owing from it to the plaintiff; and for money found to be due from the  
5 defendant to the plaintiff on account stated between them; and the plaintiff claims from the defendant two hundred eighty-nine and 38/100 dollars (\$289.38), with interest from October 20, 1920, until paid, according to the Bill of Particulars hereto annexed, besides costs.

DAVID WIENER,  
*Attorney for Plaintiff.*

*Bill of Particulars.*

Filed August 18, 1922.

\* \* \* \* \*

American Railway Express Company, Inc., to the Fashion Shop,  
Incorporated, Dr.

Oct. 20, 1920. To 13 dozen Shirts at \$22.00 per doz..... \$286.00

Consigned to Prominent Shirt Company,  
85 Fifth Ave., New York, N. Y.

“ “ “ To Express charges prepaid'..... 3.38

Amount due..... \$289.38

Plaintiff claims from defendant the sum of \$289.38, interest from October 20, 1920, besides costs.

DAVID WIENER,  
*Attorney for Plaintiff.*

*Judgment.*

Entered November 18, 1924—Minutes 15, P. 372.

\* \* \* \* \*

Upon consideration of defendant's motion for a new trial filed herein, it is considered that said motion be, and the same is hereby overruled.

Further, it appearing under Rule of Court that judgment on finding in this cause should be entered, it is so ordered. Wherefore, it is considered that the plaintiff recover of defendant the sum of Two Hundred Eighty-Nine Dollars and Thirty-eight Cents (\$289.38), with interest from October 20, 1920, and costs, and have execution thereof.

*Docket Entries.*

\* \* \* \* \*

1. August 18, 1922.—Declaration and Bill of Particulars filed.
2. Sept. 1, 1922.—Continued subject to two days' call by defendant.
3. March 5, 1923.—Called for trial March 8 at 11 o'clock per order filed.
4. March 6, 1923.—Subpœna (D. T.) and copy issued by defendant. Returned served (P) L. L. Hamner 3/6/23.
5. November 5, 1924.—Trial finding plaintiff \$289.38 interest from 10/20/20. Minutes 15, page 356.
6. November 8, 1924.—Defendant files motion for new trial. Hearing November 13, 1924—10 o'clock. Minutes 15, page 359.
7. November 18, 1924.—Defendant's motion for new trial overruled. Minutes 15, page 372. Judgment on finding for plaintiff for \$289.38, interest from 10/20/20 and costs. Minutes 15, page 372.
8. December 6, 1924.—Writ of Error received and notice sent defendant in error.
9. December 6, 1924.—By agreement of parties, Court fixes amount of undertaking to act as supersedeas in sum of \$500. Minutes 15, page 392.
10. December 11, 1924.—Bill of Exceptions submitted. Hearing December 19, 1924—10 o'clock. Minutes 15, page 397.

*Order.*

Entered December 19, 1924.—Minutes 15, page 402.

\* \* \* \* \*

The Court, having this day signed the bill of exceptions taken at the trial of this cause, and heretofore submitted, now hereby orders the same of record nunc pro tunc.



*Assignment of Errors.*

Filed December 11, 1924.

\* \* \* \* \*

Comes now the defendant and complains and assigns errors committed by the trial court in the following particulars:

1. In finding that the plaintiff had given the notice of claim required by the contract of shipment and the law relative thereto.
2. In finding that the correspondence from the plaintiff to the defendant was a sufficient claim as required by the contract of shipment and the law relative thereto.
3. In holding that the defendant had waived the notice of claim required by the contract of shipment and the law relative thereto.
4. In finding for the plaintiff in excess of the sum of \$98.15.

MINOR, GATLEY AND ROWLAND.  
ARTHUR P. DRURY,  
*Attorneys for Defendant.*

8 Service of copy of the foregoing Assignment of Errors is hereby accepted this 10th day of December, 1924.

DAVID WIENER,  
*Attorney for Plaintiff.*

*Motion to Strike Assignment of Errors.*

Filed December 17, 1924.

\* \* \* \* \*

Comes now the plaintiff in the above-entitled cause and moves this Honorable Court to strike from the record numbered paragraphs 1, 2 and 3 of the paper filed herein by the defendant, entitled "Assignment of Errors," for the reason that this Court did not find as therein alleged; nor did this Court rule as would appear from a reading thereof.

DAVID WIENER,  
*Attorney for Plaintiff.*

Minor, Gatley & Rowland and A. P. Drury, Esqs.,  
*Attorneys for Defendant:*

Please take notice that the foregoing motion will be heard before Judge Aukam, in the Municipal Court of the District of Columbia, on Friday, December 19, 1924, at ten o'clock, a. m., or as soon thereafter as counsel may be heard.

DAVID WIENER,  
*Attorney for Plaintiff.*

Service of a copy of the foregoing Motion is acknowledged this 15th day of December, 1924.

MINOR, GATLEY & ROWLAND,  
ARTHUR P. DRURY,  
*Attorneys for Defendant.*

*Memorandum.*

Plaintiff's motion to strike "Assignment of Errors" overruled for lack of jurisdiction. Minutes 15, page 403. Entered December 19, 1924.

9 Municipal Court, District of Columbia. Filed Dec. 19, 1924.

In the Municipal Court of the District of Columbia.

No. 82454.

THE FASHION SHOP, INC., Plaintiff,

VS.

AMERICAN RAILWAY EXPRESS CO., a Corporation, Defendant.

*Bill of Exceptions.*

Be it remembered that on the 8th day of March, 1923, this cause having come on to be heard before the Honorable George C. Aukam, one of the Judges of this Court, without a jury, the plaintiff appearing by David Wiener, Esquire, and the defendant appearing by Messrs. Minor, Gatley & Rowland, and Arthur P. Drury, Esquire, the following proceedings were had:

Thereupon the plaintiff to sustain the issues on its part offered and introduced evidence, oral and documentary, as follows:

**Frederick M. Pelzman**, being first sworn, testified that he was the president and general manager of the plaintiff corporation and was such on October 20, 1920. On that date he helped pack, address and delivered to the defendant, American Railway Express Company, for forwarding to the Prominent Shirt Company, New York City, N. Y., one box of shirts, valued at \$286.00. Said box was plainly marked with the names of the shipper and the consignee, and each shirt bore a label reading "The Fashion Shop—2 Stores—Washington, D. C." A receipt for said shipment was given to the plaintiff by the agent of the defendant company and carrying charges of \$3.38 were paid to the defendant at the time the shipment was made. The defendant never notified the plaintiff that it had not delivered the shipment to the consignee; nor that it had placed the said shipment in the On Hand Department; nor that it would offer the same for sale; nor that such a sale had been had; nor that it held the proceeds of such sale to the credit of the shipper. The first information that the defendant had not delivered the shipment came on May 2, 1922, at which time the



local attorney for the Prominent Shirt Company advised witness that he had caused an investigation to be made concerning a claimed credit for merchandise returned and that this shipment, when tendered by the Express Company, had been refused.

On cross-examination the witness further testified that his first communication to the defendant Express Company relative to this shipment was dated May 2, 1922, stating:

"On October 20, 1920, we forwarded one box of shirts, value \$286.00, to the Prominent Shirt Company, New York City, and were advised at this late date that the same were not received by them.

"In order to avoid threatened litigation against us, and other complications, etc., will you please use extraordinary efforts and advise by return mail results of your check of this shipment.

"We hold express receipt signed by "Titlow."

"Copy of this letter being sent to your New York City Office."

The witness further testified that receiving no reply to that letter on May 9, 1922, he addressed a further letter to the defendant, stating:

"On May 2nd we wrote you by U. S. Mail registered letter, requesting you to notify us at once what became of case of shirts valued at \$286.00, shipped by us on October 20th, 1920 to the Prominent Shirt Company, Broadway, New York City, but to which we have no reply.

"The Prominent Shirt Company insists that they never received the case and we have heard nothing from you. Unless we  
11 get a definite and correct reply from you in the matter immediately the situation may develop into a big loss to your company.

"We trust you will give the above matter your prompt and serious consideration and thus avoid any trouble to you."

The witness further testified that on October 24, 1921, the said consignor, Prominent Shirt Company, in the Municipal Court of this District, instituted a suit against the Fashion Shop for \$289.50, which claim of \$289.50 embraced the value of the shirts constituting this shipment and that said suit was dismissed October 27, 1921, after service had been made upon the Fashion Shop, upon the witness explaining that the shirts constituting the shipment of October 20, 1920, had been returned for which a credit should have been given to offset the claim of the shirt company, at which time he exhibited the receipt of the Express Company to said attorney.

The witness also testified that on June 14, 1922, the plaintiff, Fashion Shop, filed with the defendant Company a formal claim for loss of this shipment, upon a blank furnished by the defendant Company, which said claim was thereupon duly identified and introduced in evidence.

The witness also identified, and there was received in evidence, the receipt issued by the defendant company to the plaintiff at the time said shipment was delivered to the defendant Express Company, which said receipt is as follows:

"Date: 10/20, 1920.

At Washington, D. C.



## American Railway Express Co. (Incorporated).

Received from The Fashion Shop the shipments, hereinafter listed, which the Company agrees to carry subject to the classifications and tariffs in effect on date hereof, and to the terms and conditions and agreements on the inside front cover of this book.

Not negotiable.

12

| "Description and contents. | Value herein declared by shipper to be | Consigned to           | Destination. |
|----------------------------|----------------------------------------|------------------------|--------------|
| 1 Bx.....                  | 286.00                                 | Prominent Shirt Co.... | New York.    |

TITLOW (1),  
*For the Company."*

Thereupon the plaintiff rested its case.

Thereupon defendant, through its counsel, admitted that said shipment had not been delivered because of the refusal of the consignee to accept it; that the shipment was subsequently sold and that the defendant Company then had in its possession the sum of \$98.15 representing the proceeds of such sale, which sum it was ready and willing to pay to the plaintiff, if the Court should hold it was entitled thereto.

Thereupon the defendant, to sustain the issues on its part, offered and introduced evidence oral and documentary, as follows:

**Donald McPherson**, being duly sworn, testified that he was the assistant to the local claim agent of the defendant Company; that he was familiar with the operations of the defendant and that a reasonable time for a shipment from the City of Washington to be delivered in said City of New York was from one to two days.

On cross-examination the witness further testified that it was the custom of the defendant to notify the shipper when a shipment was refused by the consignee and that it was also the custom of the defendant to notify the shipper of any proposed sale of undelivered shipments, as well as the amount received from such sale. The witness could not say whether such notice had been given in this case.

The defendant thereupon offered, and there was received in evidence, a copy of the Express Classifications and Tariffs, duly certified by the Secretary of the Interstate Commerce Commission to  
13 have been in force on October 20, 1920, which said Classification and Tariff contained the terms and conditions of the Uniform Express Receipt, among which terms and conditions Section 7 was in words and figures following:

"7. Except where the loss, damage or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carriers within four months after delivery of the property, or in



case of failure to make delivery then within four months after a reasonable time for delivery has elapsed; and suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed."

Whereupon, the case was submitted and taken under advisement by the Court.

On November 5, 1924, the Court, by the Honorable George C. Aukam, entered a finding in favor of the plaintiff for the amount sued for, to which finding the defendant duly excepted. Thereafter, on the 8th day of November, 1924, the defendant filed a motion for a new trial, which said motion was on the 18th day of November, 1924, overruled and judgment entered on the finding of said court for the plaintiff against the defendant for the full amount sued for, to the entry of which judgment the defendant duly objected and excepted, and thereafter, pursuant to notice, said defendant applied to the Court of Appeals of the District of Columbia for a writ of error, which said writ of error was allowed on December 6, 1924.

14 Be it further remembered that the exceptions taken by counsel for the defendant to the rulings of the Court and its decision upon the whole evidence, the substance of which evidence is included in this Bill of Exceptions, were then and there separately taken and noted on the minutes of the Judge presiding.

And thereupon, after the foregoing proceedings, which are hereby made a part hereof, the defendant by its counsel tendered its Bill of Exceptions and prayed the Court to sign, seal and make the same a part of this record, and to have the same force and effect as to each and every of the exceptions taken by the defendant and noted by the Court, as aforesaid, as if the same had been set forth in a separate Bill of Exceptions, signed and sealed by the Justice presiding at the trial which is accordingly done, now for then, this 19 day of December, 1924.

GEORGE C. AUKAM,  
*Judge of the Municipal Court of  
the District of Columbia.*

David Wiener, Esq.,  
Attorney for Plaintiff.

SIR:

Please take notice that the foregoing Bill of Exceptions will be presented to Judge Aukam, one of the Judges of the Municipal Court, for settlement on Friday, December 19, 1924, at ten o'clock a. m.

MINOR, GATLEY & ROWLAND,  
ARTHUR P. DRURY,  
*Attorneys for Defendant.*

Service of copy of the foregoing Bill of Exceptions and notice accepted this 10th day of December, 1924.

DAVID WIENER,  
*Attorney for Plaintiff.*

14½ [Endorsed:] No. —. The Fashion Shop, Inc., plaintiff, vs. American Railway Express Company, a corporation, defendant. Bill of exceptions. Minor, Gatley & Rowland, Arthur P. Drury, Attorneys-at-law, Colorado Building, Washington, D. C. Municipal Court, District of Columbia. Filed Dec. 19, 1924.

15 Municipal Court, District of Columbia. Filed Dec. 6, 1924.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable George C. Aukam, Judge of the Municipal Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Municipal Court, before you, between The Fashion Shop, Inc., a corporation, plaintiff, and American Railway Express Company, a corporation, defendant, No. 82,454, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable George E. Martin, Chief Justice of the said Court of Appeals, the sixth day of December, in the year of our Lord one thousand nine hundred and twenty-four.

[Seal of the Court of Appeals, District of Columbia.]

HENRY W. HODGES,  
*Clerk of the Court of Appeals  
of the District of Columbia.*

Alowed by

GEORGE E. MARTIN,  
*Chief Justice of the Court of  
Appeals of the District of Columbia.*



16

*Designation of Record.*

Filed December 11, 1924.

\* \* \* \* \*

The Clerk will please prepare the Transcript of Record on Appeal in the above cause, and include therein the following:

1. The Declaration and Bill of Particulars.
2. Judgment.
3. The Docket Entries.
4. Order Settling Bill of Exceptions and making same part of record.
5. Assignment of Errors.
6. This Designation.

MINOR, GATLEY & ROWLAND,  
ARTHUR P. DRURY,  
*Attorneys for Defendant.*

Service of copy of the above Designation of Record accepted this 10th day of December, 1924.

DAVID WIENER,  
*Attorney for Plaintiff.*

*Additional Designation of Record.*

Filed December 22, 1924.

\* \* \* \* \*

The Clerk will please prepare and include the following additional papers as part of the Transcript on appeal:

1. Plaintiff's Motion to Strike Assignment of Errors.
2. This Designation.

DAVID WIENER,  
*Attorney for Plaintiff.*

17 Service of a copy of the foregoing additional Designation of Record is accepted this 20th day of December, 1924.

MINOR, GATLEY & ROWLAND,  
ARTHUR P. DRURY,  
*Attorneys for Defendant.*

18 Municipal Court of the District of Columbia

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

I, Blanche Neff, Clerk of the Municipal Court of the District of Columbia, hereby certify the foregoing pages numbered from 2 to 17, both inclusive, to be a true and correct transcript of the record, according to direction of counsel herein filed, copy of which is made

part of this transcript, in cause At Law No. 82454, wherein The Fashion Shop, Incorporated, is plaintiff, and American Railway Express Company, Incorporated, is defendant, as the same that remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 26th day of December, 1924.

[Seal of the Municipal Court, District of Columbia.]

BLANCHE NEFF,  
*Clerk.*

Endorsed on cover: District of Columbia Municipal Court. No. 4267. American Railway Express Company, Incorporated, plaintiff in error, vs. The Fashion Shop, Incorporated. Court of Appeals, District of Columbia. Filed Dec. 27, 1924. Henry W. Hodges, clerk.

(5054)





COURT OF APPEALS  
DISTRICT OF COLUMBIA

~~FILED~~

MAR 11 1925

*Henry M. Hodges*  
Court of Appeals, District of Columbia. CLERK

JANUARY TERM, 1925.

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**No. 4267.**

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AMERICAN RAILWAY EXPRESS COMPANY,  
INCORPORATED, PLAINTIFF IN ERROR,

*vs.*

THE FASHION SHOP, INCORPORATED.

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**BRIEF ON BEHALF OF PLAINTIFF IN ERROR.**

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BENJAMIN S. MINOR,  
H. PRESCOTT GATLEY,  
HUGH B. ROWLAND,  
ARTHUR P. DRURY,  
*Attorneys for Plaintiff in Error.*





# Court of Appeals, District of Columbia.

JANUARY TERM, 1925.

---

**No. 4267.**

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AMERICAN RAILWAY EXPRESS COMPANY,  
INCORPORATED, PLAINTIFF IN ERROR,

*vs.*

THE FASHION SHOP, INCORPORATED.

---

**BRIEF ON BEHALF OF PLAINTIFF IN ERROR.**

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## **Statement of the Case.**

On October 20, 1920, the defendant in error, The Fashion Shop, Incorporated (hereinafter called the plaintiff), delivered to the plaintiff in error, the American Railway Express Company, a corporation (hereinafter called the defendant), a box of shirts, consigned to the Prominent Shirt Company, New York City, N. Y. (R., p. 6). The shipment



was valued at \$286.00 and express charges of \$3.38 were paid by the plaintiff (R., p. 6).

The shipment was not delivered by the defendant because of the refusal of the consignee to accept it (R., pp. 7-8) and it went into the On Hand Department of the defendant and was subsequently sold for \$98.15 (R., p. 8). The defendant offered to pay the proceeds of such sale to the plaintiff if the Court should hold it was entitled thereto (R., p. 8). No notice was given the plaintiff that the defendant could not deliver the shipment, nor of the fact that the shipment was placed in the On Hand Department, nor of its subsequent sale (R., p. 6).

A receipt was given the plaintiff at the time the shipment was delivered to defendant (R., p. 6) which recited that the shipment was carried subject to classifications and tariffs of the defendant in effect on that date (R., p. 8), which said classification and tariffs contained the terms and conditions of the Uniform Express Receipt, among which terms and conditions was Section 7, as follows:

"7. Except where the loss, damage or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carriers within four months after delivery of the property, or in case of failure to make delivery then within four months after a reasonable time for delivery has elapsed; and suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed" (R., p. 8).

The first communication from the plaintiff to the defendant about this shipment was in the form of a letter, dated May 2, 1922, written nineteen months after shipment was made, requesting an investigation of the shipment (R., p. 7). This was followed by a similar letter on May 9, 1922 (R., p. 7), and on June 14, 1922, the plaintiff filed with defendant a formal claim for loss of this shipment (R., p. 7). This suit was filed in the Municipal Court on August 18, 1922 (R., p. 1).

A reasonable time to deliver a shipment from Washington to New York City is from one to two days (R., p. 8).

On October 24, 1921, the Prominent Shirt Company, the consignee of this shipment, instituted a suit in the Municipal Court of this District against the plaintiff in this case to recover the sum of \$289.50, which embraced the value of the shirts in this shipment of October 20, 1920. The suit was dismissed three days later after service had been made on the Fashion Shop, when the president of the Fashion Shop told the local attorney for the Prominent Shirt Company that he had returned the shipment on October 20, 1920 (R., p. 7).

On November 5, 1924, the judge of the Municipal Court before whom the case was tried entered a finding for the plaintiff for the full amount sued for, and on the 18th day of November, 1924, judgment was entered on said finding (R., p. 9). Thereafter the defendant applied to this Court for a writ of error, which was allowed on December 6, 1924 (R., p. 10).

#### **Assignments of Error.**

1. The Court erred in finding that the plaintiff had given the notice of claim required by the contract of shipment and the law relative thereto.



2. The Court erred in finding that the correspondence from the plaintiff to the defendant was a sufficient claim as required by the contract of shipment and the law relative thereto.

3. The Court erred in holding that the defendant had waived the notice of claim required by the contract of shipment and the law relative thereto.

4. The Court erred in finding for the plaintiff in excess of the sum of \$98.15.

### **ARGUMENT.**

At the trial of this case in the Municipal Court, and again at the hearing on the motion for a new trial, it was conceded by the plaintiff that it had not given the defendant the notice of claim required by the express receipt. It was contended by the plaintiff, however, that it was under no obligation to give the notice of claim because the defendant had given no notice of its inability to deliver the shipment. In other words, the defendant not having notified the plaintiff that the shipment had not been delivered, the plaintiff contended it was under no obligation to give it the notice of claim required by the express receipt.

It will be seen, therefore, that the question in this case is whether the defendant is estopped from asserting, or has waived the right to claim the benefit of, this provision of its contract requiring notice of claim as a precedent to recovery. The first and second assignments of error, therefore, will be passed without further argument.

## II.

**The Court Erred in Holding that the Defendant had Waived the Notice of Claim Required by the Contract of Shipment and the Law Relative Thereto.**

The defendant is a common carrier, subject to the Interstate Commerce Act (24 Stats. L., 379) by reason of the express provisions of Section 1 thereof (34 Stats. L., 584). The proviso in the amendment to Section 20 of said Act (41 Stats. L., 494, Sec. 438, amending 38 Stats. L., 1196-1197, Chap. 176, amending 34 Stats. L., 593, 595, Section 7), in effect when this shipment was made is as follows:

*“Provided further, that it shall be unlawful for any common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suits than two years, such period for institution of suits to be computed from the date when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim or filing of claim shall be required as a condition precedent to recovery.”*

In accordance with this law, the Uniform Express Receipt provided:

“7. Except where the loss, damage or injury complained of is due to delay or damage while being



loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carriers within four months after delivery of the property, or in case of failure to make delivery then within four months after a reasonable time for delivery has elapsed; and suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed" (R., p. 8).

And this provision, both by reference thereto in the receipt given for the shipment and by law, became a part of the contract of shipment.

Atchison, Topeka & Santa Fe Railway Co. *v.* Robinson, 233 U. S., 173.

Boston & Maine Railroad *v.* Hooker, 233 U. S., 97.

Galveston, Harrisburg & San Antonio Railway Co. *v.* Woodbury *et al.*, 254 U. S., 357.

American Railway Express Co. *v.* Lindenburg, 260 U. S., 584.

New York Central Railroad Co. *v.* Lazarus, 278 Fed., 900.

From the situation in this case it is at once apparent that it does not come within one of the exceptions of the law and the receipt—in other words, the loss, damage or injury was not caused by “delay or damage while being loaded or unloaded” or “damaged in transit by carelessness or negligence,” and it has not been contended that the case came within those exceptions.

The question is, therefore, whether the carrier can waive the benefit of this provision by any conduct of its own. It is respectfully submitted that the answer to this question has been given by the Supreme Court of the United States in the case of *Georgia, Florida and Alabama Railroad Company v. Blish Milling Company*, 241 U. S., 190. In that case the milling company delivered to the carrier a carload of flour consigned to its own order with directions to notify a third person at point of destination. A sight draft upon this third person was attached to the bill of lading and forwarded to a bank for collection. The carrier, without requiring payment of the draft and surrender of the bill of lading, delivered the car to this third person. Upon an inspection the flour was rejected and returned to the railway company, which subsequently sold it. Within a few days thereafter the milling company made a claim against the railroad for the entire contents of the car at invoice price. The Supreme Court held that this notice was a sufficient compliance with the bill-of-lading provision, but the defense set up by the carrier was, among others, that the shipper had failed to comply with the provision of the bill of lading requiring claims for loss, damage, or delay to be made in writing within four months after the delivery of the shipment or, in case of failure to make delivery, then within four months after a reasonable time for delivery had elapsed, and that unless claims were so made the carrier should not be liable. In considering that defense, Mr. Justice Hughes said for the Court, page 195:

“The clause with respect to the notice of claims—upon which the plaintiff in error relies in its second contention—specifically covers ‘failure to make de-



livery.' It is said that this is not to be deemed to include a case where there was not only a failure to deliver to the consignee but actual delivery to another or delivery in violation of instructions. But 'delivery' must mean delivery as required by the contract, and the terms of the stipulation are comprehensive—*fully adequate in their literal and natural meaning to cover all cases where the delivery has not been made as required.* When the goods have been misdelivered there is as clearly a 'failure to make delivery' as when the goods have been lost or destroyed; and it is quite competent in the one case as in the other for the parties to agree upon reasonable notice of the claim as a condition of liability. It may be urged that the carrier is bound to know whether it has delivered to the right person or according to instructions. This argument, however, even with respect to the particular carrier which makes a misdelivery, loses sight of the practical object in view. In fact, the transactions of a railroad company are multitudinous and are carried on through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations. \* \* \*

"The clause gave abundant opportunity for presenting claims and we regard it as both *applicable and valid.*

\* \* \* \* \*

“It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But *the parties could not waive the terms of the contract under which the shipment was made pursuant to a Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations.* A different view would antagonize the plain policy of the Act, and open the door to the very abuses at which the act was aimed.” (Italics ours.)

This decision of the Supreme Court of the United States has been followed many times, not only by the Supreme Court itself, but by the State courts throughout the country. As an example of the extreme situations under which this clause has been held applicable and the Blish case followed, attention is respectfully directed to the following cases:

In the case of *Kemper Mill Company v. Missouri Pacific Railroad Company*, 193 Mo. App., 466, the carrier made an intentional and wilful misdelivery of the property and took a bond of indemnity from the person to whom delivery was made. The Court held that a provision in the bill of lading requiring claims to be made within four months was valid and applicable.

In the case of *Hilbert v. Pennsylvania Railroad Company*, 227 Pa. St., 105, plaintiff, on November 21, 1917, shipped a carload of household goods by way of defendant's lines. By some oversight the goods were not delivered to the plaintiff on arrival, although she made repeated inquiries for them, but were sent to a storage warehouse, where they



were later found. By that time charges had accumulated against the shipment and the defendant refused to surrender the goods without the payment of these charges. Suit was thereupon brought for the value of the goods on May 29, 1920. The shipment was made under a bill of lading which contained a provision similar to the provision in the present case except that the time for filing claim was six months instead of four months. The trial court granted a compulsory nonsuit, from which an appeal was taken. In affirming the case the court said:

“\* \* \* her right of action was lost by failure to make such written claim within six months after a reasonable time for delivery, as the provision in the bill of lading to that effect is obligatory. See 243 U. S., 592, 605; 180 U. S., 49; 74 U. S., 386; 197 N. Y. S., 281; 75 Penn. Super. Ct., 222; 107 Fed., 628.”

In *Texas & Pacific Railway Company v. Leatherwood*, 250 U. S., 478, the Supreme Court followed the *Blish* case, saying, page 481:

“The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and its terms in respect to conditions of liability are binding upon the shipper and upon all connecting carriers, just as a rate properly filed by the initial carriers is binding upon them. Each has in effect the force of a statute, of which all affected must take notice. That a carrier cannot be prevented by estoppel or otherwise from taking advantage of the lawful rate properly filed under the Interstate Commerce Act is well settled.”

In *Bronstein v. Payne*, 138 Md., 116, where the carrier failed to deliver a shipment, it raised the defense set up here. There, as here, the question of waiver or estoppel was raised. The Court held, after consideration of the *Blish* and *Leatherwood* cases, that the carrier could not waive, nor be estopped from, setting up such a defense.

We submit that, as a matter of fact, the plaintiff in this case had actual notice of the non-delivery of the shipment, or had the means of such notice, long prior to May 2, 1922. On October 24, 1921, *one year after the date of this shipment*, suit was instituted in the Municipal Court of the District by the consignee of this shipment *to recover the value of the shirts which constituted this shipment* (R., p. 7). Would not that fact indicate to the ordinary business man that the return shipment of those goods had not been received? Is not that sufficient to put anyone on notice that something was wrong? But the plaintiff lies by supinely for almost seven months more and then writes the defendant, not making a claim for loss, but merely asking that its shipment be "checked" (R., p. 7).

Assuming that the defendant was negligent in not giving notice of its inability to deliver this shipment, when process in the suit of the Prominent Shirt Company against The Fashion Shop was served it had actual notice this shipment had not been delivered. Certainly by October 27, 1921, when that suit was dismissed in the Municipal Court, at the instigation of The Fashion Shop, it had actual notice of the non-delivery of this shipment. Notwithstanding such notice, it waited almost seven months thereafter before even writing to this defendant, and almost eight months before filing a formal claim. So that the plaintiff did not



even attempt to comply with the provisions of its contract of shipment until almost eight months after it must have had notice that this shipment had not been delivered.

### III.

#### **The Court Erred in Finding for the Plaintiff in Excess of \$98.15.**

The defendant had in its possession the sum of \$98.15 which belonged to the *owner* of the shipment made on October 20, 1920, and it tendered itself ready and willing to pay that amount to the plaintiff if the Court should find it was entitled thereto. The suit by the Prominent Shirt Company against the plaintiff herein would seem to cast considerable doubt on the right of the plaintiff to recover even this amount, for it is certainly a fair assumption that the Prominent Shirt Company was the owner of this shipment, otherwise it would not have instituted suit against The Fashion Shop for the value thereof. It was within the province of the Court, however, and the Court had the right, if it saw fit, to order said fund paid to the plaintiff herein, but in ordering an amount to be paid in excess of said sum of \$98.15, it is submitted, the Court committed error.

In conclusion, we submit defendant could not, under the law as interpreted by the Supreme Court of the United States, waive the benefit of the provision requiring notice of claim; that as a matter of fact plaintiff had notice of the inability of the defendant to deliver this shipment and made no attempt to comply with the law by filing a claim

within the four months' period. For these reasons the plaintiff was not entitled to maintain its suit and the judgment of the court below in its favor was erroneous and should be reversed.

Respectfully submitted,

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COURT OF APPEALS  
DISTRICT OF COLUMBIA  
FILED

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IN THE

**Court of Appeals, District of Columbia**

January Term, 1925.

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No. 4267.

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AMERICAN RAILWAY EXPRESS COMPANY, INCORPORATED,  
*Plaintiff in Error,*  
vs.  
THE FASHION SHOP, INCORPORATED,  
*Defendant in Error.*

---

**BRIEF ON BEHALF OF DEFENDANT IN  
ERROR.**

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STATEMENT OF THE CASE.

On October 20, 1920, the defendant in error, The Fashion Shop, Incorporated (hereinafter called the plaintiff), delivered to the plaintiff in error, American Railway Express Company, Incorporated (hereinafter called the defendant), for forwarding to the Prominent Shirt Company, New York City, N. Y., one box of shirts, valued at \$286.00. Said box was plainly marked with the name of the shipper and with the name of the consignee, and each shirt bore a label reading "The Fashion Shop—2 Stores—Washington,

D. C." A receipt for said shipment was given to the plaintiff by the agent of the defendant company and carrying charges of \$3.38 were paid to the defendant by the plaintiff. (R., p. 6.)

The defendant never notified the plaintiff that it had not delivered the shipment to the consignee; nor that it had placed the said shipment in the On Hand Department; nor that it would offer the same for sale; nor that such a sale had been had; nor that it held the proceeds of such sale to the credit of the plaintiff. (R., p. 6.)

It is the custom of the defendant to notify the shipper when a shipment is refused by the consignee. It is also the custom of the defendant to notify the shipper of any proposed sale of undelivered shipments; and it is also the custom of the defendant to notify the shipper of the amount received from any such sale. (R., p. 8.)

The first information that the defendant had not delivered the shipment came on May 2, 1922, at which time the (R., p. 6) local attorney for the consignee advised the plaintiff that said attorney had caused an investigation to be made concerning a claimed credit for merchandise returned, and that such investigation disclosed that the shipment when tendered by the Express Company had been refused. (R., p. 7.)

On the same day, May 2, 1922, the plaintiff wrote to the defendant Express Company, stating:

On October 20, 1920, we forwarded one box of shirts, value \$286.00, to the Prominent Shirt Company, New York City, and were advised at this late date that same were not received by them.

In order to avoid threatened litigation against us, and other complications, etc., will you please



use extraordinary efforts and advise by return mail results of your check of this shipment.

We hold express receipt signed by "Titlow."

Copy of this letter being sent to your New York Office.

And no reply having been received up to May 9, 1922, a further letter was addressed to defendant, which read:

On May 2nd we wrote you by U. S. Mail registered letter, requesting you to notify us at once what became of case of shirts valued at \$286.00, shipped by us on October 20th, 1920, to the Prominent Shirt Company, Broadway, New York City, but to which we have no reply.

The Prominent Shirt Company insists that they never received the case and we have heard nothing from you. Unless we get a definite and correct reply from you in the matter immediately the situation may develop into a big loss to your company.

We trust you will give the above matter your prompt and serious consideration and thus avoid any trouble to you.

On June 14, 1922, the plaintiff filed with the defendant company a formal claim upon a blank furnished by the defendant. (R., p. 7.)

On October 24, 1921, the Prominent Shirt Company, the consignee of the shipment, instituted a suit against the Fashion Shop for \$289.50, which claim embraced the value of the shirts constituting this shipment, and said suit was dismissed October 27, 1921, after service had been made, by plaintiff herein explaining that the shirts constituting the shipment of October 20, 1920, had been returned for which a credit should have been

given to offset the claim of the shirt company, and the receipt of the Express Company was exhibited to the attorney for the shirt company. (R., p. 7.)

The shipment was not delivered by the defendant because of the refusal of the consignee to accept it (R., p. 8).

A reasonable time for a shipment from the city of Washington to be delivered in the city of New York is from one to two days. (R., p. 8.)

On November 5, 1924, the judge of the Municipal Court before whom the case was tried entered a finding for the plaintiff for the full amount sued, to which finding defendant excepted. (R., p. 9.) On November 18, 1924, judgment was entered on said finding, to which the defendant excepted. (R., p. 9.) No other exceptions were taken or noted; and the Court did not make, nor was it requested to indicate separately its findings of fact and conclusions of law.

### MOTION TO STRIKE ASSIGNMENT OF ERRORS.

Reference is had to plaintiff's motion to strike (R., p. 5), and to the ruling of the lower court as to lack of jurisdiction (R., p. 6).

There was and is absolutely no foundation in the Record for appellant's Assignment of Errors numbered 1, 2, and 3, respectively, and the same should not be considered by this Court on appeal.

*Sullivan v. Killigan*, 41 App. D. C. 391;  
*Cooper v. Sillers*, 30 App. D. C., 567;  
*Scott v. Herrell*, 31 App. D. C. 45;  
*Clerk's Investment Co. v. Sydnor*, 19 App. D. C.  
 89;  
*Eaton v. Brown*, 20 App. D. C. 453.



## ARGUMENT.

Without waiving, but expressly reserving the point heretofore made, and not accepting Appellant's Assignment of Errors as the basis of this Brief, Appellee respectfully submits that the obligation of the defendant was two-fold: (1) To deliver the shipment to the consignee; and (2) in the event of the failure or refusal of the consignee to receive the shipment, to give notice of such failure or refusal to the consignor (R. p. 2). The defendant Express Company admitted that it had not given such notice, and as its sole defense urged the applicability of the provisions of Section 7 of the Uniform Express Receipt. (R., p. 8.)

The Court below did not hold that the defendant is estopped from asserting, or has waived the right to claim the benefit of Sec. 7 of the Uniform Express Receipt; nor did the Court below hold that the defendant had waived the notice of claim.

The said Section has no applicability to the situation presented by this case, which differs in every material respect from the situation and the facts as passed upon by the courts in the cases cited in Appellant's brief.

In the case of *Georgia, Florida, and Alabama Railroad Company v. Blish Milling Company*, 241 U. S., 190, cited by Appellant, the Milling Company had consigned the shipment to its own order; the Railroad Company also notified the shipper of its inability to make delivery, part of the shipment being damaged; and further, the shipper made claim immediately against the Railroad Company. It is apparent that the shipper and the consignee being one and the same party; that notice was given by the Railroad Company; and that claim was made by the shipper-con-

signee for loss occasioned by part of the shipment being damaged in transit (all of which is essentially different from the facts in the present case), there was reason for the Court considering the applicability of the clause with respect to notice of claim, and for holding, based on the facts in that case, that the clause was both applicable and valid. General statements made in the opinion of the Court, are merely *obiter dictum* when applied to a case presenting essentially different facts, and are not controlling.

In the present case there was not a failure to deliver to the consignee, but a delivery to the consignee by the defendant and a refusal by the consignee to accept the shipment (R. p. 8).

In the case of *Hilbert v. Pennsylvania R. R. Co.*, 277 Pa. St. 105, cited in appellant's brief, the plaintiff had shipped a carload of household furniture by the defendant's lines, consigned to herself. By some oversight the goods were not delivered to plaintiff on arrival, although she made repeated inquiries for them, but were sent to a storage warehouse where they were later found. Meantime charges had accumulated without payment of which defendant declined to surrender the goods, and to recover their value plaintiff brought her action. In such circumstances, she being both consignor and consignee, and having first-hand and prompt knowledge of their non-delivery, her failure in such circumstances to make claim within the time limited undoubtedly made the clause in question both applicable and valid.

Again, in the case of *Texas & Pacific Railway Company v. Leatherwood*, 250 U. S. 478, cited in appellant's brief, the circumstances and facts were totally at variance with those in the present case. The action



filed in 1915, was for damages for injuries to a shipment of horses while in transit in 1913, of which injuries the shipper thereof was aware, and the six-months limitation clause not being unreasonable in the circumstances was therefore properly held applicable and valid.

And so in the case of *Kemper Mill Co. vs. Missouri Pacific R. Co.*, 193 Mo. App. 466, cited by appellant, the action was by the holder of the Bill of Lading, the consignee, and therefore he had notice of non-delivery and could have made claim in the time limited. In such circumstances the limitation clause was not unreasonable and was properly applicable.

In *Bronstein v. Payne*, 138 Md. 116, also cited by appellant, the action was to recover the value of one bale of rags out of a consignment of nine bales. "The appellants (shipper) knew the value of the bale of rags at the time it was lost, and also knew then exactly how much money they had lost." The defense interposed was that no written claim for damages had been filed within the time limited by the Bill of Lading under which they were shipped. The Court said: "Whether, under the circumstances of the case, that defense should have been allowed, is the sole question we are called upon to consider upon this appeal." *The circumstances of the case* at all times, it is submitted, are controlling as to the application of the clause of limitation.

In all the cases cited by the appellant the consignor either had notice of the non-delivery and failed to make claim, or the claim had been made in an informal manner after notice brought home to the consignor of the failure to deliver, or the consignor and consignee were one and the same person. These cases are there-

fore not authoritative on the application of the limitation clause to a state of facts whereby the knowledge of the non-delivery rests solely in the Express Company, who, by its acts differing from the established custom, withheld giving notice of such non-delivery to the shipper, and by so acting prevent the making of a claim by the shipper.

The record in the present case shows that the appellee did not have notice, actual or otherwise, of the non-delivery or refusal to accept the shipment by the consignee until the day of making the claim by registered mail, which was May 2, 1922, and any limitation within the rule of reason can only in justice run from such date.

The suit filed by the Shirt Company vs. The Fashion Shop was not for this shipment of shirts or the value thereof, but for an alleged unpaid balance due on open account, although the value of the shipment and the amount sued happened to be very near the same, being \$289.50 in one instance, and \$289.38 in the other. The suit was dismissed upon exhibition by the plaintiff to the attorney for the Shirt Company of the Express Company receipt, which indicated a shipment valued at \$286.00, and for which a credit should have been given to off-set the claim of the Shirt Company (R., p. 7). After the dismissal of said suit the local attorney for the Shirt Company caused an investigation to be made concerning the claimed credit for merchandise returned, and based on such investigation, notified plaintiff on May 2, 1922, of the fact that the shipment when tendered by the Express Company had been refused. (R., p. 7.) May 2, 1922, and not October 24, or October 27, 1921, was therefore the date of the first



notice plaintiff had of the refusal <sup>of</sup> ~~for~~ the consignee to accept the shipment.

The filing of a suit for a balance due on an open account, as against which a claimed credit might be offset for merchandise returned, is not a notice to a party who might assert such a credit that the returned merchandise had not been accepted by the consignee, but the suit being dismissed was but to further the presumption of delivery.

The defendant, although it had in its possession the sum of \$98.15, realized from a sale of the shirts in the shipment made by plaintiff, never at any time made a legal tender of that amount; and by indirection arrives at a false assumption that the Prominent Shirt Company was the owner of the shipment. The defendant admits, however, that it was within the province of the Court below, and that the Court had the right to find for the plaintiff in this amount. By the same token, it is submitted, the Court below had the right to find for the plaintiff for the amount sued, which represented the actual value of the shipment.

THE CARRIER NOT HAVING GIVEN ANY NOTICE TO THE SHIPPER THAT THE CONSIGNEE HAD REFUSED TO RECEIVE THE SHIPMENT, THE CIRCUMSTANCES OF THE CASE MAKE INAPPLICABLE THE PROVISION RELIED UPON BY APPELLANT.

“The burden of showing a state of facts which will relieve a carrier from the duty of notifying the consignor, in case it cannot deliver a shipment of goods, rests upon the carrier.” Syllabus in *Stoddard Lum-*

*ber Co. v. Oregon-Washington R. & Nav. Co.*, 84 Ore. 399, 165 Pac. 363.

We quote at length from the opinion of the Court—Oregon Supreme Court on appeal from judgment in favor of plaintiff (shipper) in Circuit Court for Baker County:

“Plaintiff’s right of action in this case is based wholly on its contention that, where goods cannot be delivered by a terminal carrier in accordance with the contract of transportation, the duty devolves on such carrier to notify the owner of the goods, whether he be consignor or consignee. This principle is challenged by counsel for defendant. The liability of an initial carrier under the Carmack Amendment is only that imposed by the common law on its connecting carrier. *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 511, 57 L. ed. 314, 44 L. R. A. (N. S.) 257, 33 Sup. Ct. Rep. 148; *Judson, Interstate Commerce*, 2d ed. Sec. 46. The Common law was evolved before the days of mail and telegraphs. We cannot, therefore, expect to find in the common law anything more than a statement in general terms of the duties devolving on a common carrier when it becomes impossible for the carrier to deliver shipments in accordance with the contract of carriage.

“The common law principle is that in such case the carrier is charged with the duty of ordinary care and diligence for the protection of the property of the owner. 4 *Elliott, Railroads*, 2d ed. Sec. 1463; 2 *Hutchinson, Carriers*, 3d ed. Sec. 714. What, then, is the duty which ordinary care and diligence, as applied to the conditions under which we live, impose upon a terminal carrier when it is unable to deliver a shipment at the point of destination? The shipments so carried by interstate carriers are of great variety; some of them are perishable, many of them fluctuate in value, many



of them are valuable only in limited territories and for short seasons, and their marketing often requires special skill and instruction. It is not to be expected that the terminal agents of the carrier will be advised in all cases of the value of the shipments, or of the proper method of caring for them and protecting their owners from loss. The Interstate Commerce Commission, in the case of *Kchoe v. Nashville C. & St. L. R. Co.*, 14 Inters. Com. Rep. 555, 556, said: '*It is in the interest of the public that the consignor should be promptly notified when the shipment is not delivered.*'

"We think the interests of the carrier are subserved by a rule which requires notice to the consignor within a reasonable time after the refusal or failure of the consignee to accept delivery. A rule which requires such prompt notification will be of value in releasing rolling stock of the carrier and making it available for future business. Ordinarily, a post-card notification would be sufficient.

"There is a conflict of authority on the question as noted by this court in *Normile v. Oregon R. & Nav. Co.*, 41 Or. 177, 182, 69 Pac. 928. We think the weight of authority sustains the principle that in such case the carrier must exercise due diligence to notify within a reasonable time, 5 *Thomp. Neg.* Sec. 6622; 12 *Am. & Eng. Enc. Law*, 2 ed. 557; *Nashville C. & St. L. R. Co. v. Dreyfuss-Weil Co.* 150 Ky. 444, 150 S. W. 321; *American Sugar Ref. Co. v. McGhee*, 96 Ga. 27, 21 S. E. 383; *Alabama G. S. Co. v. McKenzie*, 139 Ga. 410, 45 L. R. A. (N.S.) 18, 77 S. E. 647; *Michigan C. R. Co. v. Harville*, 136 Ill. App. 243; *Carrizzo v. New York, S. & W. Co.*, 66 Misc. 243, 123 N. Y. Supp. 173; *Fine v. Barrett*, 81 Misc. 234, 142 N. Y. Supp. 533; *Sauer v. Lehigh Valley R. Co.* 150 N. Y. Supp. 977. This court is partially committed to the doctrine of these authorities. *McGregor v. Oregon R. & Nav. Co.*, 50 Or. 527, 536, 537, 14 L. R. A. (N.S.) 668, 93 Pac. 465. As applied to interstate ship-

ments, the question is one of Federal law, and the Federal Supreme Court is the final arbiter. Its decisions trend in the direction of the above rule. *The Thames*, 14 Wall. 98, 107, 20 L. ed. 804, 806, *North Pennsylvania Co. v. Commercial National Bank*, 123 U. S. 727, 734, 31 L. ed. 287, 290, 8 Sup. Ct. Rep. 266.

“Circumstances will doubtless arise from time to time which will relieve the carrier from this duty; as, for example, when the owner of the goods has no place of abode. *Butler v. East Tennessee & V. R. Co.* 8 Lea 32, 34. The burden of showing such a state of facts devolves on the carrier. The authorities cited by the defendant state no consistent rule. Some of them hold that the duty of carriers is a variable duty, dependent upon the circumstances. *The Keystone v. Moies*, 28 Mo. 243, 246, 75 Am. Dec. 123; *Manhattan Rubber Shoe Co. v. Chicago, B. & Q. R. Co.*, 9 App. Div. 172, 41 N. Y. Supp. 83, 85; *Kremer v. Southern Exp. Co.*, 6 Coldw. 356. Some of the authorities relied on by defendant involved no question of notice. *Fisk v. Newton*, 1 Denio, 45, 43 Am. Dec. 649; *Ginnichio-Jones Fruit Co. v. Missouri, K. & T. R. Co.*, 153 Mo. App. 598, 134 S. W. 1028. Others of the authorities cited sustain defendant’s contention, *Hudson v. Baxendale*, 2 Hurlst. & N. 575, 157 Eng. Reprint, 237, 27 L. J. Exch. N. S. 93, 6 Week. Rep. 83; *Weed v. Barner*, 45 N. Y. 344, 6 Am. Rep. 96. These cases are out of harmony with the weight of American authority, and, in our judgment are not sustained by sound reasoning.

“The initial carrier was held liable for the damage sustained. For further authoritative construction of this legislation, see *Georgia, F. & A. R. Co. v. Blish Mill Co.* 241 U. S. 190, 194, 60 L. ed. 948, 951, 36 Sup. Ct. Rep. 541, and *Cleveland, C. C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. ed. 453, 36 Sup. Ct. Rep. 177. *Under the con-*



*struction which has been placed by the Federal Supreme Court on the Carmack Amendment, we are clear that the defendant is chargeable with the neglect of the Denver & Rio Grande R. R. Co. to notify plaintiff's assignors."*

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Where the consignee refuses to accept goods, it is the duty of the carrier to notify the consignor of the refusal, and to hold the goods subject to the consignor's order. *American Sugar Ref. Co. v. McGhee*, 96 Ga. 27, 21 S. E. 383; *Alabama G. S. R. Co. v. McKenzie*, 139 Ga. 410, 45 L. R. A. (N.S.) 18, 77 S. E. 647; *Michigan C. R. Co. v. Harville*, 136 Ill. App. 243; *Nashville C. & St. L. R. Co. v. Dreyfuss-Weil Co.*, 150 Ky. 333, 150 S. W. 321; *Edison Keith & Co. v. Atchison, T. & S. Fe R. Co.*, 192 Ill. App. 350; *Howard v. Old Dominion S. S. Co.*, 83 N. C. 158, 35 Am. Rep. 571; *Beedy v. Pacey*, 22 Wash. 94, 60 Pac. 56.

In *Alabama G. S. R. Co. v. McKenzie*, 139 Ga. 410, 45 L. R. A. (N.S.) 18, 77 S. E. 647, an action for damage to a shipment of peaches, it was held that, where a consignee refused to receive goods the carrier was chargeable with the duty of notifying the consignor that the goods were held subject to his order; that it held them as a warehouseman for the consignor, and that it would be a breach of trust for the carrier to sell the goods without notice to the consignor unless the stress of circumstances was such as to justify it in assuming the place of the owner respecting the preservation of the goods for the protection of the owner.

In *American Sugar Ref. Co. v. McGhee*, 96 Ga. 27, 21 S. E. 383, the court declared that, where the consignee declines to accept the goods the carrier's liability as such, ceases, and it becomes liable as warehouseman only, and as such is chargeable with the duty of notify-

ing the consignor of the consignee's refusal to accept the goods.

In *Edson Keith & Co. v. Atchison, T. & S. F. R. Co.*, 192 Ill. App. 350, where, although having notice before the arrival of a shipment that the consignee would not receive the goods, the carrier placed them in a warehouse and failed to give notice of the refusal to the consignor for nearly two months, there was held a breach of the carrier's contract which rendered it liable for the loss resulting from the delay in the return of the shipment to the consignor, who ordered its return after finally receiving notice of its non-acceptance by the consignee.

And in *Howard v. Old Dominion S. S. Co.*, 83 N. C. 158, 35 Am. Rep. 571, it was held that, where the consignee declines to receive the goods, the carrier still owes the duty to take care of them, at least for a reasonable time, and communicate with the owner; and in that case, the carrier was held liable where, after the consignee's refusal to accept goods, no notice was given the consignor, and they were left on a river bank, and the freight charges were subsequently accepted from a stranger who took the goods away without the carrier's objection.

*Moore*, "*The Law of Carriers*" 2nd ed. Sec. 31, says: "When goods are safely conveyed to destination, and the consignee does not accept or refuses to receive the goods, the carrier may discharge itself from further responsibility, except as warehouseman, by storing the goods in its warehouse, or in that of some responsible third party, and the goods are then subject to its lien for storage as well as transportation. *After notice sent to the consignor or owner*, and the goods being held in storage for a reasonable length of time, if the



consignee still refuses to receive the goods, the lien may be enforced as provided by law, and the carrier will be discharged from further liability upon accounting for the proceeds.

While in 10 *Corpus Juris—Carriers* the law is thus stated:

Sec. 386. Where the consignee fails or refuses to receive the goods shipped, it is the duty of the carrier to store the goods either in its own warehouse or in that of some responsible third party, and to hold the goods subject to the order of the consignor for a reasonable time. It has no right to abandon the goods to destruction or unnecessarily to expose them to loss or damage, nor to convert the freight to its own use or to dispose of it contrary to law. But where the carrier has complied with its duty to warehouse the goods, its strict common-law liability as insurer is at an end, and thereafter its relation to the goods is only that of warehouseman, and it is bound to the exercise of ordinary care in preserving them.

“Sec. 387. In addition to warehousing the goods, the carrier is ordinarily chargeable with the duty of notifying the consignor of the consignee’s failure or refusal to accept the goods. (Citing *The Eddy*, 5 Wall. 481, 18 L. ed. 486.)

*Moore*, “*The Law of Carrier*,” 2d ed. Vol. 1, page 479 says: “Nor will the shipper be precluded from bringing suit after the expiration of the time limited, where he was induced to delay action by the fraud or misrepresentation of the carrier. Upon the same principle it is held in New York that a shipping receipt limiting the liability of a carrier to claims presented within a fixed time does not relieve it of liability for a wrongful delivery, though the claim was not presented

as soon as the consignor discovered the fraud. *Security Trust Co. v. Wells Fargo & Co. Express*, 178 N. Y. 620, 81 App. Div. 426."

On page 482 the same author says:

"The only question that can arise is as to whether the condition is a reasonable one with reference to the circumstances of any particular case."

and on page 483 it is stated:

"Where the shipper has been prevented from or delayed in filing a claim for the goods within the time prescribed by the carrier's falsely informing him that the goods were still in its possession and would be returned, or by the carrier's promise to find the goods, or by similar representations, the carrier is estopped from pleading the condition in the bill of lading or shipping receipt as a defense to the action." Citing *Security Trust Co. v. Wells, Fargo & Co. Express*, *supra*.

"Such condition of a contract of shipment applies to the carrier's conduct as a warehouseman, since such relation is properly incident to that of carrier." Citing *Armstrong v. Chicago, etc., R. Co.*, 53 Minn. 183, 54 N. W. 1059.

Again in 10 *Corpus Juris—Carriers*, Sec. 487, it is stated:

"It is also very generally held that stipulations of the character under consideration have no application where the goods are never delivered. This principle has been applied in case of a conversion of the goods by the carrier."



In the case of *St. Louis, I. M. & S. R. Co. v. Starbird*, 243 U. S. 592, the court said, page 604:

Stipulations of this character have not infrequently been inserted in bills of lading, and, where reasonable in their terms, have been sustained by this court. *Southern Exp. Co. v. Caldwell*, 21 Wall. 264; *The Queen of the Pacific*, 180 U. S. 49. *Whether such stipulations are reasonable or not depends on the circumstances of each case.* *Pennsylvania Co. v. Shearer*, 75. Ohio St. 249.

It is therefore urged that, when careful consideration is given to the facts of this case, the Court below did not err in finding for the defendant in error, and that the judgment entered by the Court below should not be disturbed.

Respectfully submitted,

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